

1961

Utah State Tax Commission v. Ralph Child Construction Company : Brief of Appellant

Utah Supreme Court

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**In the Supreme Court of the
State of Utah**

UTAH STATE TAX COMMISSION,
Respondent,

vs.

**RALPH CHILD CONSTRUCTION
COMPANY,**

Appellant.

9374
FILED

FEB 8 - 1961

Clerk, Supreme Court, Utah

APPELLANT'S BRIEF

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In the Supreme Court of the State of Utah

UTAH STATE TAX COMMISSION,
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RALPH CHILD CONSTRUCTION
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APPELLANT'S BRIEF

STATEMENT OF FACT

On or about August, 1958, Mr. Laron Kunz, an auditor of the Utah State Tax Commission, made an audit of the books of the Ralph Child Construction Company (Tr. 47). Mr. Child testified that it was his understanding that the audit was being made of the books and records of Southeast Service, but that the auditor, contrary to permission, explored his office files and made a report which is the basis of this lawsuit (Tr. 37). In any event, as a result of this audit the Utah State Tax Commission found \$3,608.00 to be due and payable for sales and use taxes and filed a

warrant for delinquent sales and use taxes against Mr. Child's property. This warrant was dated February 16, 1959. Mr. Child, on February 18, 1959, filed a petition with the Utah State Tax Commission to review the assessment. On or about April 6, 1959, a hearing was had and evidence taken pertaining to the alleged deficiencies, which hearing was continued to March 22, 1960, for the further taking of testimony. The principal items of dispute arose out of a job the taxpayer had for the Emery County Union Telephone Association, Inc., under a contract dated May 23, 1952.

This job involved the complete construction of a telephone system in Emery County under the direction of the R.E.A. The contract price, lump sum was \$107,632.21 (See Taxpayer's Ex. 2) (Tr. 14). There were additions made to the contract and it was later increased in amount.

In connection with this job the taxpayer (contractor) purchased telephone poles from Southam & Sons, Spanish Fork, Utah, and telephone equipment manufactured by Kellogg Switchboard and Supply Company of Chicago. Sales by Kellogg were solicited by Kellogg in Utah through their sales representative.

The auditor found that during the year 1952 Mr. Child purchased from Southam & Sons \$25,231.03 worth of telephone poles and that these telephone poles were purchased for "resale." As evidence of this, the Tax Commission furnished one invoice from Southam & Sons marked "for resale", which is State's Exhibit No. 1 (See Tr. 59-60). The taxpayer supplied the Tax Commission with purchase orders for all of these poles and for the placing of the same

in the holes, which are shown as Taxpayer's Exhibit 11, and which generally contain the following notations:

"To: Southam & Sons
Address: Spanish Fork, Utah
Shipped To: Ralph Child
Address: Emery County, Utah

All poles to be gained, drilled and to have all inspection fees and taxes paid thereon. Shipped by seller's choice, f.o.b. job, if by truck, freight prepaid, terms same as general contract with R.E.A.",

or in the alternative, the purchase orders contained this language:

"taxes paid by seller."

In spite of the seller's purchase orders, the Tax Commission found on the basis of the one invoice from Southam & Sons that Mr. Child purchased these poles for "resale." There was no testimony on this subject other than that of Mr. Child. This one invoice is the Commission's only evidence.

The Tax Commission through this audit found that Mr. Child had purchased \$49,945.33 worth of telephone equipment from Kellogg Switchboard and Supply Company, but that Kellogg Switchboard and Supply Company was not a "resident" of the State of Utah and that, therefore, the purchaser had to collect and pay the sales tax. This they found in spite of their own finding (Finding of Fact 8b) that the equipment was sold to the taxpayer, f.o.b., Price, Utah, and the evidence was that the transaction was made and completed by the seller's agent, one H. E. Mundy, as a result of solicitation of business from the taxpayer in Utah. The

evidence shows that the transaction was made in the Mission Motel in Price, Utah, at the behest of H. E. Mundy, agent for Kellogg Switchboard and Supply Company (See Tr. 89).

The other items of dispute were items purchased out of state by the taxpayer for use within this state. The Commission found (Finding of Fact 8c) that these items amounted to \$188,177.02.

Mr. Child's contentions are set forth in his Schedules which are set forth in the Appendix to this Brief.

Schedule A sets forth the material purchased for use out of the State and which were used out of the State. This schedule has been amended to correct errors made in his original filing.

Schedule B is a summary of material purchased for ultimate consumption and, therefore, exempt from sales tax.

Schedule C consists of material purchased out of State for use within the State, which the taxpayer concedes tax liability.

Schedule D is a summary of material purchased in Price, Utah, from the Kellogg Switchboard and Supply Company.

Many of the taxpayer's records are incomplete or unavailable. His schedules have been prepared from such information that remains available. His business practice requires the elimination of records more than six years old and, therefore, he is at a distinct disadvantage requiring to defend this type of a proceeding at this date. The taxpayer has done six or seven million dollars in business since the date of the complained of transaction (Tr. 101).

STATEMENT OF POINTS**POINT 1**

THE UTAH STATE TAX COMMISSION AUDITORS ERRED IN ASSESSING SALES TAX, INTEREST AND PENALTIES ON THE PURCHASE OF TELEPHONE POLES FROM LEE SOUTHAM & SONS. (Schedule B, Appendix)

POINT 2

THE UTAH STATE TAX COMMISSION AUDITORS ERRED IN ASSESSING USE TAX, IINTEREST, AND PENALTIES ON THE PURCHASE OF TELEPHONE SUPPLIES AND EQUIPMENT FROM THE KELLOGG SWITCHBOARD AND SUPPLY COMPANY (Schedule D, Appendix)

POINT 3

THE UTAH STATE TAX COMMISSION AUDITORS ERRED IN ASSESSING SALES OR USE TAX ON PROPERTY PURCHASED OUT OF STATE FOR USE OUT OF STATE, SAID ITEMS BEING EXEMPT. (Schedule A, Appendix)

POINT 4

THE UTAH STATE TAX COMMISSION AUDITORS ERRED IN ASSESSING SALES OR USE TAX ON PROPERTY PURCHASED OUT OF STATE, INTENDED FOR USE IN THE STATE, NOT USED IN THE STATE, BUT LATER SOLD OUT OF STATE IN ISOLATED AND OC-CASIONAL SALES, SAID SALES BEING EXEMPT. (Schedule C, Appendix)

POINT 5

THE UTAH STATE TAX COMMISSION ERRED IN ASSESSING PENALTIES AND INTEREST IN ANY EVENT FOR THERE IS NO PRIMARY OBLIGATION ON THE PART OF THE APPELLANT TO PAY THE ALLEGED USE TAX AND NO SHOWING OF WILLFULNESS IN NOT PAYING, OR KNOWLEDGE ON PART OF APPELLANT THAT TAX WAS DUE.

ARGUMENT

POINT 1

THE UTAH STATE TAX COMMISSION AUDITORS ERRED IN ASSESSING SALES TAX, INTEREST AND PENALTIES ON THE PURCHASE OF TELEPHONE POLES FROM LEE SOUTHAM & SONS. (Schedule B, Appendix)

In order to understand appellant's position it is necessary to understand the definitions set forth in Utah Code Annotated 59-15-2. The definitions applicable are as follows:

“(e). The term “retailer” means a person doing a regularly organized retail business in tangible personal property, known to the public as such and selling to the user or consumer and not for resale, and includes commission merchants and all persons regularly engaged in the business of selling to users or consumers within the state of Utah; * * * *. The term “retail sales” means every sale within the state of Utah by a retailer or wholesaler to a user or consumer, except such sales as are defined as wholesale sales or otherwise exempted by the terms of this act; but the term

"retail sale" is not intended to include isolated nor occasional sales by persons not regularly engaged in business * * * *."

"(c). The term "wholesaler" means a person doing a regularly organized wholesale or jobbing business and known to the trade as such and selling to retail merchants, jobbers, dealers or other wholesalers, for the purpose of resale."

It is obvious from the above definitions that Mr. Child is neither a wholesaler or a retailer. It would appear, therefore, that his status in the transaction concerning the telephone poles must be that of an ultimate consumer. If that is true, then the tax should have been collected by the seller from the sale of these poles to the ultimate consumer. The board will recall that the evidence is undisputed that these poles went into construction, under a unit contract for installation, of a telephone system for the Emery County Farmers Union Telephone Association, Inc. They did not purchase the poles individually and there is no evidence offered by the state that they did. Under the circumstances the appellant fits within the category of a contractor as defined in the Utah Concrete Products Corporation case. In that case the court concluded that contractors are consumers within the meaning of our Act because they are the last persons in the chain to deal with such products before incorporation into a separate entity and before such products lose their identity as such. See *Utah Concrete Products Corporation v. State Tax Commission*, 101 Utah 513, 125 P.2d 408. The court there concluded specifically that sales of products made by manufacturer of building materials to contractor for use upon a private construction contract are taxable.

Now that we have concluded that the sale is one involving a sales tax and one in which the appellant is the ultimate consumer, it is appropriate that we determine whose responsibility it is to collect the tax. This matter is covered conclusively by Utah Code Annotated 59-15-5, the substance of which as it applies to this case is as follows:

“Any person receiving any payment or consideration upon a sale of property or service subject to the tax under the provisions of this act, or to whom such payment or consideration is payable hereinafter called the vendor) shall be responsible for the collection of the amount of the tax imposed on said sale. **The vendor shall collect the tax from the vendee**, but in no case shall he collect as tax an amount (without regard to fractional parts of one cent) in excess of the tax computed at the rates prescribed in this act, provided,
* * * *”

You will note by a complete reading of this statute that there is repeated reference to the “vendor”. In no instance does this section make the responsibility for collection of the tax and payment of the tax assessable to the purchaser or ultimate consumer. Nor does this transaction sit within the accepted category of a sale to a retailer for resale, for the state has offered absolutely no evidence to the effect that the ultimate consumer represented to the retailer that the personal property purchased was for resale. Without a showing of good and substantial evidence of this fact this one exception to the provision above cited cannot be used by the state as an excuse for assessing a sales tax against the appellant in this instance.

It would appear conclusively that the tax assessed in

this instance is erroneous and should, without doubt, be eliminated.

POINT 2

THE UTAH STATE TAX COMMISSION AUDITORS ERRED IN ASSESSING USE TAX, INTEREST, AND PENALTIES ON THE PURCHASE OF TELEPHONE SUPPLIES AND EQUIPMENT FROM THE KELLOGG SWITCHBOARD AND SUPPLY COMPANY (Schedule D, Appendix)

A general rational set forth in answer to Point 1 is applicable to the question in Point 2. It is the contention of the appellant that the sale made to the appellant by Kellogg Switchboard & Supply Company was a domestic sale made within the state of Utah and subject to sales tax. There is absolutely no evidence to the effect that the sale of this merchandise took place anywhere but within the state of Utah and the only testimony introduced by any person at this hearing was that introduced by the appellant to the effect that the sale was transacted in the Mission Motel at Price, Utah, for the purchase of all electronic supplies required by the plans and specifications furnished to the appellant for the construction of the telephone system for the Emery County Farmers Union Telephone Association, Inc. This being undisputed it would seem that there is no evidence upon which the Tax Commission could, under any circumstance, conclude that this was a purchase made outside of the state of Utah.

The terms of this purchase were for the sale in bulk of the items necessary to complete this contract and it was initiated, entered into and consummated in the State of

Utah. The record is devoid of any evidence that this is not a domestic sale. Under the circumstances the law applicable would seem to be the law applicable under Point 1 and this, therefore, being a sales tax, it would seem to be incumbent upon the state of Utah to assess the tax to the retailer and collect it from him. These matters have been the subject of many disputes but four cases which are in point and which substantiate the position of the appellant are as follows:

1. Whitmore Oxygen Company vs. Utah State Tax Commission, 196 P.2d 976:

This was an original proceeding by the Whitmore Oxygen Company against the Utah State Tax Commission. The question involved was whether the sale was subject to sales tax in Indiana or whether subject to use tax in Utah. The fact is that Whitmore Oxygen Company had entered into a contract with Linde Air Products Company, an Ohio corporation whose plant was located in Speedway, Indiana, whereby the plaintiff agreed to buy, and the Linde Company agreed to sell, 1,600 acetylene cylinders for the sum of \$34,000.00 f.o.b. factory, Speedway, Indiana. The contract was a title retaining contract and the lender retained title until such time as all of the installments were paid. It is the contention of the plaintiff that the sale was consummated in Utah and is, therefore, subject to sales tax and that the collection of this tax is barred by the statute of limitations, inasmuch as the plaintiff had filed regularly its annual income tax returns and had paid tax accordingly. The State Tax Commission claimed that the sale was made in Indiana, that no Utah tax return had been filed, and that the products were used in Utah and subject to use tax.

HELD:

The question of whether the sale was consummated was decided primarily on the f.o.b. provision. The court said that the f.o.b. provision made the contract complete in Indiana. The language of the court is as follows:

"The necessary implication of an f.o.b. contract is that the buyer shall bear all expense and bear all risk of loss after the goods are delivered free on board, and there is a presumption that the property in the goods passes when the goods have been so delivered, and that the place where the goods are to be delivered f.o.b. shall be the place of delivery to the buyer. See *Williston on Sales*, 2d Ed., Section 280(b). Under this view, when the cylinders were delivered free on board at Speedway, Indiana, the property in the goods passed and the sale was complete. * * * We conclude that for tax purposes the sale of cylinders was consummated in Indiana."

2. Another case which is persuasive is that of *Department of Revenue v. Jennison-Wright Corporation*, 66 N.E. 2d 395:

FACTS:

This is a complicated fact situation inasmuch as it involves three separate cases, however, all of the cases reach the same conclusion based upon primarily the same substantive facts. In general, the problem was this: That an Ohio corporation which qualified to do business in the State of Illinois sold railroad ties to an Illinois corporation. The ties were produced by the Ohio company's plant in Alabama and were inspected and improved and accepted

by the railroad company in Alabama. In Alabama the ties had been cut and seasoned and accepted by the railroad company, but the Ohio company had dipped them in creosote in Illinois. One of the cases was distinguished to this extent, that the ties which were sold were completely finished, including creosoting and were stocked in the company's warehouse in Missouri. All of the ties contracted for were sold f.o.b. East St. Louis, Illinois.

Was this a transaction subject to use tax or was the contract subject to sales tax and if so, who was responsible for the tax.

HELD:

The court concluded that it was a sale consummated and concluded in the State of Illinois and that it was subject to sales tax in the State of Illinois. The appellant's contention that while it held the ties in Illinois, it did so only as a bailee, was disposed of on the basis of where the delivery took place. The court said:

"The facts in this case are in conflict with any theory that the railroad company purchased the timbers from the producer. Appellants made the contract with the producer whereby the latter was to load the timbers on cars at point of origin. They were sold f.o.b. cars at point of origin consigned to appellants, and they in turn paid the producer the contract price. The general rule is that the delivery of personal property by the seller to a common carrier to be conveyed to the purchaser is a delivery to the purchaser and that the title to the property vests in the purchaser immediately upon its delivery to the carrier.

The fact that the railroad inspected the timbers at

point of origin and later transported them to this state without charge to appellant, would not, in view of all the circumstances, show that the parties intended that the title to the property should pass from the producer to the railroad company. The construction of a contract is to ascertain the intention of the parties, and there is no more convincing evidence of what the parties intended than to see what they did in carrying out its provisions. The title to the timbers passed from the producer to appellants and remained there until appellants completed the treatment process and delivered them f.o.b. cars, East St. Louis, Illinois. The transaction was a sale and not a bailment."

3. In addition to the above citation, the following case is of interest for it touches on the subject matter in issue here:

American Bridge Company v. Forrest Smith, 157 A. L.R. 798, 352 Mo. 616, 179 SW(2d) 12:

FACTS:

This was an action for declaratory judgment to determine the taxability of certain sales under provisions of the Missouri Sales Tax Law. The plaintiff was a corporation organized under the laws of the state of New Jersey with its principal place of business at Pittsburgh, Pennsylvania. It was engaged in fabricating structural steel at various places in the state of Missouri and it sold the products to customers in and outside the state of Missouri. The suit was for declaratory judgment testing the constitutionality of the Sales Tax Law as an interference with commerce. The Court, in discussing the problem, stated this:

HELD:

"The transfer of the ownership of, or title to, the property are presumed to have taken place where the possession of the products was delivered to the vendees' there is no evidence that the plaintiff and the purchasers had a contrary intention. And in these instances, where the title was presumptively transferred to the purchasers in a foreign state (delivery f.o.b. cars at plaintiff's plants in other states" it would seem beyond question that such sales may not be taxed (basically) under the provisions of our Sales Tax Act, inasmuch as the sales were not sales at retail "in this state,"."

It would seem, therefore, that the reverse would be true and perhaps this case should be authority for the contention of plaintiff in the instant case.

4. The most recent case covering the subject is handed down by the U. S. Supreme Court entitled *Scripto, Inc. vs. Carson*. The case is as yet unreported as of this date but can be found in CCH publication "State Tax Review".

FACTS:

Scripto was doing business in Florida by commission merchant only and did not own, lease, or maintain any office or other business property in Florida nor did it have any regular employee or agent there. Orders for its products were solicited by advertising specialty brokers. Florida has a sales tax law similar to ours which states in effect that the tax on sales is collectible from "dealers" and is to be added to the purchase price. The question was whether, in light of the appellants operation, Florida could collect the tax.

HELD:

The court in this case said that Scripto had to collect and pay the tax even though its agent worked for several principals.

It is our position that there is absolutely no evidence introduced by the State that this was a sale made outside of the State of Utah for use within the State of Utah. If that is the circumstance the state has not carried their burden and we, of course, have introduced evidence to the contrary showing that it was a domestic sale within the state of Utah, for which the retailer incurs the obligation. We call the Court's attention to the invoices (Taxpayer's Exh. 5 and 6) which are marked f.o.b. Price, Utah, as evidence in harmony with the three cases cited above.

POINT 3

THE UTAH STATE TAX COMMISSION AUDITORS ERRED IN ASSESSING SALES OR USE TAX ON PROPERTY PURCHASED OUT OF STATE FOR USE OUT OF STATE, SAID ITEMS BEING EXEMPT. (Schedule A, Appendix)

In respect to the items shown on Schedule A of Exhibit 1, we have testified that these items were purchased for use out of the state. Clearly they are not taxable for there has been no showing whatsoever that these items were stored in the state of Utah, or used in the state of Utah, or sold in the state of Utah. The only thing that has been done in respect to the items shown on Schedule A is that the State Tax Commission has concluded that the fact that they were purchased outside the state of Utah means

that they were used in the state of Utah. This is a conclusion without supporting facts which strikes us as unfair, unjust and contrary to our constitutional rights which say that we shall not be deprived of property without due process of law. Merely because there are invoices does not prove that the use was within the state of Utah. The invoices themselves prove nothing in respect to this that gives rise to the belief that a tax is owing. It is incumbent upon the state to rebut the testimony of the appellant that all of this merchandise and equipment shown on Schedule A was used outside of the state of Utah. Since they have offered no evidence to the contrary, the evidence submitted by the appellant is persuasive and conclusive. The State Tax Commission should be required to decide matters of such importance upon evidence rather than conjecture or opinion and unless it has concrete evidence that these items were used in the state of Utah, it has no basis upon which to impose a tax. It isn't incumbent upon the taxpayer to do more than testify in respect to where these items went and unless refuted clearly the testimony stands and is persuasive and binding upon the Commission.

POINT 4

THE UTAH STATE TAX COMMISSION AUDITORS ERRED IN ASSESSING SALES OR USE TAX ON PROPERTY PURCHASED OUT OF STATE, INTENDED FOR USE IN THE STATE, NOT USED IN THE STATE, BUT LATER SOLD OUT OF STATE IN ISOLATED AND OCCASIONAL SALES, SAID SALES BEING EXEMPT. (Schedule C, Appendix)

The items shown on Schedule C are self-explanatory. These items were purchased for use in the state of Utah but were resold out of state. It is our contention that these matters are exempt as isolated and occasional sales. Appellant cites as authority for its position in this respect the case of Geneva Steel Company vs. The State of Utah, 209 P.2d 208. The court in that case used the following language, which should be appropriate and binding in this case:

“Isolated or occasional sales made by persons not regularly engaged in business are not subject to the tax. Under this rule no sale is taxable if it is not made in the regular course of a business of person selling tangible personal property. The word “business” as thus used refers to an enterprise, engaged in selling tangible personal property notwithstanding the fact that the sales may be few or infrequent.”

This appears to cover us explicitly. The appellant is not regularly engaged in the business of selling tangible personal property. These sales can only be construed as isolated or occasional sales, and, therefore, exempt by the express provisions of this statute. The court further stated the following, which is in point:

“The above regulations, as well as those of other states which we have examined, definitely contemplate an isolated or occasional sale as one made by a person while not in the pursuit of the regular course of his business of selling tangible personal property. We think this is a proper and fair interpretation.”

The appellant is without controversy a contractor. It is not his business to sell personal property and he does not sell personal property. He has not filed a sales tax return

for he is not in the business of selling taxable personal property as a regular course of his business. Any sales that are made from his business are of an isolated and occasional nature and are expressly exempt and intended to be exempt by the Utah State Legislature. It seems to us to be a gross injustice to assess a tax on property of this nature.

POINT 5

THE UTAH STATE TAX COMMISSION ERRED IN ASSESSING PENALTIES AND INTEREST IN ANY EVENT FOR THERE IS NO PRIMARY OBLIGATION ON THE PART OF THE APPELLANT TO PAY THE ALLEGED USE TAX AND NO SHOWING OF WILFULNESS IN NOT PAYING, OR KNOWLEDGE ON PART OF APPELLANT THAT TAX WAS DUE.

In respect to all of the taxes discussed above the appellant feels that to assess a penalty and interest is grossly unfair, unjust and punitive without cause. The responsibility to collect the taxes in any case where there has been sales is upon the retailer, not the consumer. The responsibility to collect use tax is primarily upon the retailer and not the user. Only in the event that the retailer does not pay the use tax is the user responsible. Utah Code Annotated 59-16-6 states:

“Every retailer making sales of tangible personal property for storage, use or other consumption in this state, not exempted under the provisions of section 59-16-4 hereof, shall be responsible for the collection of the tax imposed by this act from the purchaser. The retailer may, if he sees fit, collect the tax from the purchaser, but in no event shall he collect as tax an amount

(without regard to fractional parts of one cent) in excess of the tax computed at the rate prescribed by this act.

The tax herein required to be collected by the retailer shall constitute a debt owed by the retailer to this state."

(Emphasis added)

The appellant calls special attention to the provision that the law above cited says that the tax herein required to be collected by the retailer shall constitute a debt owed by the retailer to the state. The important words are "required to be collected." It would appear from the statute that the primary obligation for the collection of use tax belongs to the retailer. Not until the purchaser has discovered that the retailer has not paid it does he become obligated. If he is obligated he is only obligated under that section of 59-16-2(j) which says:

"(j). "Taxpayer" shall include every retailer, as herein defined, and every person storing, using or consuming tangible personal property, the storage, use or consumption of which is subject to the tax imposed by this act when such tax was not paid to a retailer."

It would seem, therefore, that if there is liability, it is of a secondary nature and if it is of a secondary nature it cannot come into being until the consumer or user has learned of the failure of the retailer to pay the tax. We, of course, did not learn of this until the delinquent tax assessment was levied. Under those circumstances the fault is not ours, but the retailers' and the State of Utah. Under those circumstances no penalty should be affixed because there is no malice, fraud, or failure on the part of the tax-

payer and, consequently, only the amount of the tax found to be owing should be assessed, less interest and penalty.

The appellant calls to the attention of the Court the special definitions of "retailer" and "taxpayer" in the use tax definitions, Utah Code Annotated 59-16-2, and also the requirements that all retailers register with the Tax Commission under Utah Code Annotated 59-16-5, which seems to imply that the obligation is primarily on the retailer, and if there is a liability on the user, it is only of a secondary nature and cannot come into being until he is notified of the default of the retailer.

Tax statutes are to be construed most favorably in favor of the taxpayer and most strictly against the government:

"where the intent or meaning of tax statutes or statutes levying taxes, is doubtful, they are, unless a contrary legislative intention appears, to be construed most strongly against the government and in favor of the taxpayer or citizen. Any doubts as to their meaning are to be resolved against the taxing authority and in favor of the taxpayer, or as it is sometimes put, the person upon whom it is sought to impose the burden."

51 Am. Jur. 316, P. 367-68

The above rule is soundly arrived at and is endorsed by the Utah Supreme Court.

"Taxation statutes are strictly construed against the state and in favor of the taxpayer * * * *."

W. F. Jensen Candy Co. v. State Tax Commission,
90 U. 359, 61 P2d 629, 107 ALR 621 (1934)

CONCLUSION

The taxpayer admits that the audit discloses some purchases upon which taxes probably should have been paid (Schedule C). These items are relatively small in amount and there was no intent to defraud the state.

The other taxes assessed by the Commission are unjust and improperly made. Petitioner's objection and petition to quash the levy should be granted except as to the amount he admits he owes tax on. (See Taxpayer's Schedule C). In any event, no penalty or interest should be assessed in light of the good faith and innocent mistake of the taxpayer in this regard.

Respectfully submitted,

Jackson B. Howard, for

HOWARD AND LEWIS

Attorneys for Appellant

APPENDIX

SCHEDULE 'A'

Summary of material purchased for use out of State and which was used out of State. Page references are to the schedules made by Tax Commission. This material is believed to be tax exempt.

Page	Period	Inv. No.	Vendor	Materials	Where Used	Amount
2	8/30/54		Denver Terra Cotta Company Denver, Colorado	Terra Cotta	Ely, Nevada	\$1,126.48
2	9/10/54	SF29130	A. C. Horn Co. San Francisco, Cal.	Cement Coloring	Ely, Nevada	93.25
2	9/10/54	SF29292	A. C. Horn Co. San Francisco, Cal.	Cement Coloring	Ely, Nevada	48.50
*2	5/3/54	1240-Ashton	Hatch, Inc. Portland, Ore.	Lumber	Ely, Nevada	1,396.12
2	9/30/54	6349	Mackintosh & Truman Seattle, Wash.	Lumber	Ely, Nevada	2,270.74
2	8/4/54	2824	Metpar Steel Prod. Long Island City, N.Y.	Toilet Part. and Doors	Ely, Nevada	900.00
2	1/13/54	6074	Clipper Mfg. Co., Kansas City, Mo.	Blades	Ely, Nevada	3.00
2	1/13/54	7793	Clipper Mfg. Co. Kansas City, Mo.	Blades	Ely, Nevada	91.44
3	12/20/55	2776	Gotham Chalkboard New Rochelle, N. Y.	Display Cabinets & Chalk Board	Ely, Nevada	970.00
3	12/14/55	F2208	Loxit Systems, Inc. Chicago, Ill.	Floor Channels	Ely, Nevada	887.50
3	11/10/55	896	Water Seals, Inc. Chicago, Ill.	1500 ft. Waterstop	Gerlock, Nevada	1,725.00
3	12/10/55	6859	Winco Ventilator St. Louis, Mo.	Ventilator	Ely, Nevada	32.25
Total						\$9,544.28

*Changed from Mesquite to Ely since filing this schedule with the Tax Commission.

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SCHEDULE 'B'

Summary of material purchased for ultimate consumption and, therefore, believed to be exempt to this Company. Page references are to schedules 3, made by Tax Commission.

<i>Period</i>	<i>Vendor</i>	<i>Materials</i>	<i>Where Used</i>	<i>Amount</i>
8/23/52 to 10/22/52	Southam & Sons	Telephone Poles	Emery County	\$25,231.03

SCHEDULE 'C'

Materials purchased out of the State for use within the State which are probably taxable. Page references are to schedule 3 made by Tax Commission.

<i>Page</i>	<i>Period</i>	<i>Inv. No.</i>	<i>Vendor</i>	<i>Materials</i>	<i>Where Used</i>	<i>Amount</i>
3	12/14/55	F2208	Loxit System, Inc. Chicago, Ill.	Floor Channels	Utah	\$ 227.15
1	5/26/53	5530	Tru Line Company Des Moines, Iowa	Coils	Utah	22.00
2	7/22/54	SF29130	A. C. Horn Co. San Francisco, Cal.	Cement Coloring, etc.	Utah	73.00
2	3/18/54	2044	Ross-Martin Co. Tulsa, Oklahoma	Envelopes	Utah	6.70
2	7/22/54	3005	Schuber Sales Co.	In-wall Closet for Tables.	Utah	2,800.00
2	7/22/54	3006	Detroit, Mich.	Tables & Benches	Utah	2,800.00
3	4/11/55	4070	Schieber Sales Co. Detroit, Mich.	6 Porta Fold Tables 4 Benches	Utah	1,277.64
3	4/11/55	3568	Schieber Sales Co. Detroit, Mich.	6 Pockets for above	Utah	1,149.00
4	2/24/56	41163	Abbretton Eng. Co. Houston, Texas	Clear Glass	Utah	55.51
Total.....						\$8,411.00

SCHEDULE 'D'

This is material purchased in Price, Utah, from a representative of Kellogg Switch Board and Supply Company. This transaction was negotiated and consummated in Price, Utah, on the basis of F.O.B. Price, Utah, and was for ultimate consumption within the State although approximately thirty percent of the 1952 purchases was used outside of the State. All of the 1953 purchases were used within the State.

Page	Period	Inv. No.	Vendor	Materials	Where Used	Amount
*	1952		Kellogg Switch Board & Supply Co., Chicago, Ill. (All of these bought in Price and delivered to Price. Deal consummated at the Mission Motel and a percentage of these went to Nevada and Wyoming.)			\$49,945.33
*	1953		Kellogg Switch Board & Supply Co. (Same as above.)		(70% Emery County (1) (30% Pioche, Nevada and Wyoming)	5,622.03
Total.....						\$55,567.36

*The taxpayer recollects that several thousand dollars worth of these items were returned and credits received but do not have the credit memos to substantiate this circumstance.

(1) Resold through Amos Jackson, Architect, Engineer, of Salt Lake City to two of his clients for use in Pioche, Nevada, and in Wyoming.

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